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No. 95-300

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PETER SKYWARK,

Petitioner,

—v.—

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JEREMY J. O. HARWOOD
Counsel of Record
HEALY & BAILLIE
29 Broadway
New York, New York 10006-3293
(212) 943-3980

Attorneys for Respondent

Of Counsel:

PHILIP S. LA PENTA

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to this proceeding are Petitioner Peter Skywark and Respondent the United States Lines, Inc. & United States Lines (S.A.) Inc. Reorganization Trust (the "Trust"). The Trust is a successor-in-interest to United States Lines, Inc. and United States Lines (S.A.) Inc. It has no parent companies or subsidiaries.

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PETER SKYWARK,

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UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTER-STATEMENT OF THE CASE

United States Lines, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11, United States Code, 11 U.S.C. §§ 101 et seq. (the "Code"), on November 24, 1986, in the Bankruptcy Court. That Court entered a restraining order pursuant to the Code's automatic stay provision, 11 U.S.C. § 362(a) (the "Stay"), prohibiting commencement or continuation of suit on all pre-petition causes of action against the Debtor (the "Restraining Order", 13-16)[1].

Petitioner, Skywark filed a proof of claim, thereby submitting to the Bankruptcy Court's jurisdiction over his claim (the "Claim"). (30).

Thereafter, Debtor (and its co-debtors) proposed a plan of reorganization pursuant to the terms of the Code. Debtor's First Amended and Restated Joint Plan of Reorganization (the "Plan") was approved and confirmed by an order of the Bankruptcy Court dated May 16, 1989 (the "Confirmation Order"). (17-20). Under the Plan all of Debtor's assets were transferred to the United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust (hereinafter the "Trust") as successor-in-interest to both Debtor and its co-debtor, United States Lines (S.A.), Inc.

Petitioner has omitted to state that the Plan provided a specific method to resolve pre-petition personal injury and

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[1] Numbers in parentheses with nothing more refer to pages in the Joint Appendix, filed with the United States Court of Appeals for the Second Circuit. Numbers followed by "a" refer to pages in the Appendix reprinted in the Petition.

wrongful death claims (collectively "personal injury claims"). Paragraph 8 of the Confirmation Order provided that the Restraining Order should remain in full force and effect, subject to extension upon application to the Bankruptcy Court. (18). The Bankruptcy Court also entered an order dated April 18, 1990 extending the Stay and its Restraining Order and establishing a claims settlement program for pre-petition personal injury claims (the "P.I. Order", 21-29).

The P.I. Order also provided:

> (g) If a settlement is not reached within the 60-day review period set forth in paragraph (e) above, **upon notice to the other parties to the proceedings, either the claimant or the Reorganization Trustee may move this Court to terminate the automatic stay and the Restraining Order**. The Court may grant said relief if in its determination the moving party has complied in good faith with the claims resolution procedures set forth herein. If the Court determines otherwise, it may order the Debtors and claimants to so comply and/or grant such other relief as it deems appropriate. **Upon the termination of the automatic stay and the Restraining Order, the personal injury claimants shall be free to commence an action against the Reorganization Trust in accordance with 28 U.S.C. Section 157(b)(5)**. [emphasis added]

(26, ¶(g)).

This provision is significant because Petitioner argues that it would be wrong to assume that if he had moved for relief from the Stay, such relief would have been granted. (Pet. at 21). The P.I. Order expressly provides for relief from the Stay after a failed settlement attempt, as occurred. Moreover, after Skywark's counsel rejected the Trust's settlement offer, the Trust, by letter dated August 16, 1990 asked "when [Skywark] would move in the U.S. Bankruptcy Court to lift the stay in order to proceed with litigation of this case . . .". (78). Petitioner omits mention of this letter. Because Skywark's counsel did not reply to the Trust or take any other action to prosecute the Claim for eighteen months, the Trust itself moved to vacate the Stay. The Trust, by letter to Skywark's counsel dated January 31, 1992, set a deadline for acceptance of the settlement offer and stated it would thereafter move to lift the Stay. (78).

After the settlement deadline passed the Trust moved to terminate the Stay and Restraining Order in respect of the claims of Skywark and one other claimant, with notice to their counsel. The Bankruptcy Court entered a consent order dated August 6, 1992 terminating the Stay (the "Lift Stay Order", 31-32). The Lift Stay Order was solely in respect of these two personal injury claimants, not all creditors, as Petitioner implies. (Pet. at 5). Moreover, the Lift Stay Order recorded that notice of the Trust's application had been provided to Skywark's counsel and that no objections had been received from him. (31-32).

REASONS FOR DENYING THE WRIT

A. THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S READING OF THE PLAIN LANGUAGE OF THE CODE WAS NOT ERRONEOUS AND DOES NOT RAISE AN IMPORTANT, UNSETTLED ISSUE OF LAW

In Chief Judge Griesa's opinion for the United States District Court for the Southern District of New York he determined that Skywark's counsel received notice of the Lift Stay Order on August 17, 1992 but failed to commence the action until November 12, 1992. (80). He therefore held that "[u]nder the plain language of 11 U.S.C. § 108(c) plaintiff is time barred" and that the "statutory language [of § 108(c)] is perfectly clear and unambiguous." (82). The District Court's reading of the "plain language" of § 108(c) was based on the presumption that "a legislature says in a statute what it means and means in a statute what it says there [citations omitted]." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992). The Second Circuit correctly affirmed in a unanimous opinion. (1a-4a) .

B. THE SECOND CIRCUIT'S DECISION CREATES NO CONFLICT WITHIN THE CIRCUITS

Petitioner asserts that the "central issue in this case is one upon which the various Courts of Appeal are in conflict." (Pet. at 11). This issue is said to be whether applicable statutes of limitation "are tolled during the pendency of a bankruptcy

stay" by virtue of 11 U.S.C. § 108(c). (Pet. at 10). There is, however, no Circuit conflict in the application of the plain language of § 108(c). As the Second Circuit stated in Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993):

> The reference in § 108(c)(1) to "suspension" of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in **other** federal or state statutes.
>
> Any ambiguity with respect to this "suspension" reference in § 108(c)(1) is cleared up by examining the provision's legislative history. This history makes evident that § 108(c)(1) refers to only "special suspensions" that are found in non-bankruptcy provisions such as the Internal Revenue Code. 124 Cong. Rec. H11,109 (daily ed. Sept. 28, 1978); accord 2 Lawrence P. King, Collier on Bankruptcy ¶ 108.04 (15th ed. 1993); See also H.R. Rep. No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C.C.A.N. 5787, 6275.
>
> Our reading of the plain language and legislative history is buttressed by examining how other courts have treated this section of the code. [citing Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568, 569 (W.D. Wash. 1988) and In re Baird, 63 B.R. 60, 62 (Bankr. W.D.Ky. 1986)] [original emphasis]

Aslanidis' holding in respect of § 108(c) was followed by the Second Circuit in the decision below and most recently in Nova Bennett v. U.S. Lines, Inc., __ F.3d __, 1995 W.L. 497705 (2d Cir., August 22, 1995) (No. 94-9108, 1654), petition for reh'g filed. It has also been followed in Rogers v. Corrosion Products, Inc., 42 F.3d 292, 295 (5th Cir. 1995), cert. denied 115 S.Ct. 2614 (1995); In re Crysen/ Montenay Energy Co., 166 B.R. 546, 555 (S.D.N.Y. 1994) (quoting Aslanidis re "other federal or state statutes"); In re Confidential Investigative Consultants, Inc., 178 B.R. 739, 749 (Bankr. N.D. Ill. 1995) (same); Thurman v. Taforya, 895 P.2d 1050, 1055 (Sup. Ct. Colo. 1995) (en banc) (same). In express agreement with Aslanidis are Mamer v. Apex R.E. & T., 852 F.Supp. 870, 872 (E.D. Mo. 1994), aff'd, 59 F.3d 780, 783 (8th Cir. 1995) (Jones Act personal injury claimant time-barred because of failure to file his lawsuit within the 30 day extension of § 108(c)(2) and no circumstances existed to warrant equitable tolling); G.W. White & Son, Inc. v. Tripp, 1995 W.L. 65058, *3 (N.D.N.Y. 1995) ("a claimant would have until 30 days after the bankruptcy stay is lifted to file a claim", citing Aslanidis). See also, Easley v. Pettibone Michigan Corp., 990 F.2d 905, 912 (6th Cir. 1993) (products liability suit dismissed during pendency of Stay was untimely if not refiled within 30 days of Stay being lifted); Moser v. Universal Engineering Corp., 11 F.3d 720, 722 (7th Cir. 1993) (same); Pettibone Corp. v. Easley, 935 F.2d 120, 121 (7th Cir. 1991) ("Federal law assured plaintiffs 30 days in which to pick up the baton; if states want to give plaintiff additional time, that is their business. Some states do - e.g., Illinois, which tolls its statute of limitations during the entire bankruptcy proceeding [citation omitted]."); Farm Credit Bank of Texas v. Vallee, 148 B.R. 1021, 1024 (W.D. La. 1992) (argument that applicable prescriptive period suspended under § 108(c) rejected because of its "plain language" and "[n]othing has been presented indicating Congressional intention other than that expressed in the literal language of the statute."); In re

Deices, 137 B.R. 51, 55 (Bankr. S.D. Cal. 1992) ("no language in § 108(c) that suspends a statute of limitations from running", citing Grotting, supra); J.T. Industrial Contractors, Inc. v. Hargis Railcar, Inc., 458 S.E.2d 702, 703 (Ga. Ct. App. 1995) ("if the limitation period set by state law has expired during a bankruptcy, suit against the debtor must be commenced within 30 days after the termination of the automatic stay."); O'Lane v. Spinney, 874 P.2d 754, 756 (Sup. Ct. Nev. 1994) ("Subsection [108(c)](2) clearly anticipates that nonbankruptcy limitation periods may expire . . ."); Swartzman v. Harlan, 535 So.2d 605, 608 (Fla. App. 2 Dist. 1988) ("we adopt the better-reasoned position of Grotting [supra]"); Raikes v. Langford, 701 S.W.2d 142, 145 (Ky.Ct.App. 1986) ("§ 108(c) . . . operates to extend all state statutes of limitations applicable to the debtor.")

The only supposedly contrary Circuit decision on the application of § 108(c) to which Petitioner can point to support his alleged Circuit conflict is In re Hunters Run, Ltd Partnership, 875 F.2d 1425 (9th Cir. 1989). The Ninth Circuit decided that the eight month period to enforce mechanic's liens under Washington state law was "applicable non-bankruptcy law" that "fixes a period for commencing a civil action . . ." referred to in § 108(c). Id. at 1427. The Court held that § 108(c) "applies to toll the enforcement period of [the state statute]." 875 F.2d at 1428. It concluded:

> . . . our approach here corresponds with that recently announced by the Second Circuit addressing "the question whether section 108(c) tolls the expiration of periods governing the life of statutory liens." In re Morton, 866 F.2d 561, 566 (2d Cir. 1989). In that case, the Second Circuit held that section 108(c) operated to toll New York's ten-year period governing judgment

> liens on real property. Id. In so doing, the Second Circuit expressly rejected the approach of the bankruptcy court's opinion in this case. Id. As do we, the In re Morton court based its conclusion on statutory language. Id. In addition, the Second Circuit demonstrated persuasively that adherence to congressional purpose also required its result. See id. at 566-67 (tolling ensures that debtor cannot take "unfair advantage" simply by filing bankruptcy petition and allowing the limitations period to run). Cf. In re Phillips Construction Co., Inc., 579 F.2d 431, 432-33 (7th Cir. 1978) (similar position taken by Seventh Circuit but noting that facts of In re Warren [192 F. Supp. 801 (W.D. Wash. 1961)] "arguably distinguishable").

875 F.2d at 1429.

It is significant that Aslanidis specifically distinguished Morton, stating that "the holding in Morton is inapposite to the instant dispute, and Aslanidis may take no comfort from it." 7 F.3d at 1074. There is, therefore, no internal conflict in the Second Circuit as suggested by Petitioner. Equally, there is no conflict between the Second Circuit's decisions in Aslanidis, Bennett and the decision below, and the Ninth Circuit's decision in Hunters Run, which followed Morton.

Petitioner also cites McKinney v. Waterman S.S. Corp., 925 F.2d 1 (1st Cir. 1991). (Pet. at 9). However, § 108(c) is nowhere mentioned in that case and its statements about tolling are dicta. See Aslanidis, 7 F.3d at 1074. ("McKinney's statements about tolling are dicta . . ."). Apart from McKinney and In re Hunters Run, the only other Circuit Court decision cited by Skywark for the proposition that the Circuits are in

conflict is In re Richards, 994 F.2d 763, 765 (10th Cir. 1993). (Pet. at 10).

Richards concerned a tax assessment period under 11 U.S.C. § 507(a)(7)(A)(ii) which the Tenth Circuit held was suspended during the first of two successive bankruptcies under 11 U.S.C. § 105(a). 994 F.2d at 765. The Court made specific reference to those cases where another federal statute, 26 U.S.C. § 6503, suspended the tax collection period, but the suspension it applied was not by virtue of § 108(c). 994 F.2d at 766.

None of the above three decisions provides any basis for a good faith argument that there is a Circuit conflict.

Petitioner argues, however, that certiorari should be granted because there is also a conflict at the state level between "the Second and Fifth Circuits and the 'state court of last resort' in Illinois [citing Garbe Iron Works, Inc. v. Priester, 99 Ill. 2d 84, 457 N.E.2d 422 (1983)]." (Pet. at 11). Garbe is said to be the "leading case holding contrary to Aslanidis". (Pet. at 8).

Garbe Iron held that the filing of a bankruptcy petition, and the imposition of the Stay, stopped the applicable statute of limitations from running. This state court case, which predates the federal precedents, including Aslanidis, was expressly disapproved by Grotting, 85 B.R. at 570. ("[Garbe] . . . was decided by an Illinois state court which read into [§] 108(c)(1) an alleged Congressional intention to include bankruptcy suspensions such as the automatic stay. The better reasoned decision . . . is . . . In re Baird [supra] . . . .") Aslanidis endorsed both Grotting and Baird. 7 F.3d at 1093.

Moreover, Rogers, squarely rejected both Garbe Iron and Major Lumber Co. v. G&B Remodeling, Inc., 817 S.W.2d 474 (Mo. Ct. App. 1991), upon which Skywark also relies. (Pet. at 9). In Rogers, plaintiff alleged that he had suffered a pre-petition spinal injury at the debtor's facility. His wife also claimed damages for loss of consortium. The applicable one year statute of limitations expired during the pendency of the bankruptcy case and the Stay. The plaintiffs filed their complaint some three months after the debtor's case had been dismissed. The District Court, citing Aslanidis, dismissed plaintiffs' action as time-barred. The Fifth Circuit affirmed, agreeing that the Rogers had "'slept on [their] rights'." 42 F.3d at 295.

On appeal, however, the Rogers argued for tolling based on the same state court decisions, Garbe Iron and Major Lumber and Wells v. California Tomato Juice Inc., 118 P.2d 916 (Cal. Ct.App. 1941), relied upon by Aslanidis and now repeated by Skywark. 42 F.3d at 297 n. 7. The Fifth Circuit rejected the tolling argument, stating:

> We base our decision on the plain words of the statute and find that § 108(c) does not create a separate tolling provision [citation omitted]. The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c). Otherwise, a party must file suit within the thirty-day grace period after the end of the stay. We need not and do not reach the legislative history and policy arguments.

42 F.3d at 297.

Skywark also cites six Bankruptcy Court decisions to support his conclusion that there is a conflict.[2] (Pet. at 10). This is not the case. As noted by Rogers, in distinguishing Victoria Grain, Houts and Design Builders, "they stand for the more general proposition that § 108(c) applies to the time limits of lien enforcement (statutes of duration) as well as the more generally applicable time limits of statutes of limitation." 42 F.3d at 296, n.4. Rogers also stated, in distinguishing Coan and Chemisphere, that "other courts have reached the same result as did the Second Circuit [in Aslanidis]." 42 F.3d at 297. Although Coan is cited by Petitioner for the proposition that "the applicable statute of limitations is tolled during the pendency of a bankruptcy stay", it held exactly the opposite. (Pet. at 10). Coan held that "[i]n these circumstances, § 108(c) extends the period for enforcing the Movants' lien until 30 days after the termination of the automatic stay." 96 B.R. at 833 (emphasis added).

The sixth case cited by Petitioner, New England Carpet, deals with the Stay's effect on the creation as opposed to perfection of liens, and its relation to the creation of a secured or unsecured claim under Vermont law. 26 B.R. at 939. The case does not so much as mention 11 U.S.C. § 108. The Second Circuit's decisions are, in any event, more authoritative precedent.

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[2] In re Chemisphere Partners, 90 B.R. 380, 382 (Bankr. N.D. Ill. 1988); In re Coan, 96 B.R. 828, 832 (Bankr. N.D. Ill. 1989); In re Design Builders, 18 B.R. 392, 394-95 (Bankr. D. Idaho 1981); In re Houts, 23 B.R. 705, 707 (Bankr. W.D. Mo. 1982); In re New England Carpet Co., 26 B.R. 934, 939 (Bankr. Vt. 1983); In re Victoria Grain Co., 45 B.R. 2, 6 (Bankr. Minn. 1984).

C. THE SECOND CIRCUIT DID NOT ENGAGE IN ANY EXAMINATION OF LEGISLATIVE HISTORY IN BREACH OF RULES OF STATUTORY CONSTRUCTION

Petitioner asserts that the decision below is in conflict with this Court's decisions regarding rules of statutory construction because it improperly reviews legislative history, citing Connecticut Nat. Bank v. Germain, supra. (Pet. at 13). The decision below does not mention any legislative history whatsoever. It does, however, cite Aslanidis. It was Aslanidis, not the decision below, that reviewed legislative history to conclude:

> Our reading of the plain language and legislative history is buttressed by examining how other courts have treated this section of the [C]ode. [citations omitted; emphasis added]

7 F.3d at 1073.

Aslanidis' reading of § 108(c) was not therefore based solely on an allegedly "prohibited" reading of legislative history, but also on the "plain language" of the statute and other authority. Moreover, Rogers noted:

> While the Second Circuit's reading of § 108(c) in Aslanidis could have been based solely upon the plain language of the statute, the court nevertheless also examined the legislative history and found that it supported its interpretation. [emphasis added]

42 F.3d at 296, n. 4.

For its part, however, the Fifth Circuit noted in Rogers:

> The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c) . . . We need not and do not reach the legislative history and policy arguments.

42 F.3d at 297.

The decision below cannot be attacked because of its citation of Aslanidis which, in turn, is attacked because it allegedly improperly reviewed § 108(c)'s legislative history. (Pet. at 12-15). The plain language of the statute was also relied upon both by Aslanidis and by the decision below in affirming the District Court's reading of the "plain language of 11 U.S.C. § 108(c)". (8a). Indeed, the infirmity of Petitioner's argument is demonstrated by the fact that the Second Circuit has cited Aslanidis on three subsequent occasions for its proposition "a court should presume that a statute says what it means." 7 F.3d at 1072. See, Wetzler v. F.D.I.C., 38 F.3d 69, 73 (2d Cir. 1994); Rahim v. McNary, 24 F.3d 440, 443 (2d Cir. 1994); Motor Vehicle Mfrs. v. N.Y.S. Dept. of Env. Cons., 17 F.3d 521, 531 (2d Cir. 1994); see also Banque Arabe v. Maryland Nat. Bank, 850 F. Supp. 1199, 1209 (S.D.N.Y. 1994), aff'd 57 F.3d 146 (2d Cir. 1995).

D. THE "APPLICABLE NONBANKRUPTCY LAW" FIXING THE THREE YEAR PERIOD FOR MARITIME TORT CLAIMS DOES NOT INCLUDE SUSPENSION BY EQUITABLE TOLLING

Petitioner admits that the "applicable nonbankruptcy law . . . fix[ing] a period for commencing or continuing a civil action" in respect of the Claim is 45 U.S.C. § 56 and 46 U.S.C. § 763a. (Pet. at 7). As Petitioner states, "each of the applicable limitations periods is three years from the date the claim accrued." (Pet. at 5). Neither of those applicable statutes of limitations provides for any "suspension". The language "the end of such period, including any suspension of such period" in § 108(c)(1) must be read in the context of the preceding language in subsection (c) that refers to "applicable non-bankruptcy law . . . [that] fixes a period". Section 6503(h)(2) of the Internal Revenue Code, 26 U.S.C. § 6503(h)(2), is precisely such a "nonbankruptcy" statute specifically providing for a suspension. See In re West, 5 F.3d 423, 427 n.9 (9th Cir. 1993) (collecting cases).

Petitioner's argument that "applicable nonbankruptcy law . . . [that] fixes a period" means not only the two applicable maritime statutes of limitation but also common law principles of equitable tolling would render § 108(c) wholly nugatory. If, as Petitioner erroneously asserts, the Stay gives rise to equitable tolling of statutes of limitation which, in turn, is the "applicable nonbankruptcy law" referred to by § 108(c), then statutes of limitation would never expire during the Stay and would never have to be extended by 30 days, as provided in § 108(c)(2).

As Aslanidis stated:

> The reference in § 108(c)(1) to "suspension" of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes. [original emphasis]

7 F.3d at 1073.

Aslanidis specifically rejected the identical tolling arguments made by Petitioner. 7 F.3d at 1074. Likewise in Mamer v. Apex R.E. & T., 852 F.Supp. at 872, the District Court held in the context of a Jones Act personal injury claim that "[t]here is no common law or statutory authority . . . for the tolling of the statute of limitations during the period in which plaintiff's claims are subject to the bankruptcy stay." The Eighth Circuit affirmed. Mamer, supra. The decision below likewise concluded "maritime law therefore does not provide for tolling while the automatic stay is in effect." (3a). None of the cases cited by Petitioner support his argument that maritime tort statutes of limitation are equitably tolled merely by the imposition of the Stay.

Petitioner's argument is, in essence, a factual one: that grounds existed for equitable tolling in addition to the Stay. He states that the "only appellate court to have spoken on this issue in the context of a Jones Act proceeding was McKinney . . .". (Pet. at 21). Whether or not Petitioner's counsel mistakenly relied on McKinney, which does not mention § 108(c), this provides no grounds for tolling. Aslanidis made clear in declining to follow McKinney, that the First Circuit's "statements about tolling are dicta." 7 F.3d at 1074. Moreover, the language and, if any guide were needed, the legislative history of § 108(c) were plain to read. As noted by Collier "the

1898 Act dealt in terms of suspension of a period of limitations, rather than an extension of a period as it is worded under the Code." Id., ¶ 108.01 at p. 108-3. Grotting, a Jones Act case dealing expressly with § 108(c), was also available to enlighten Skywark's former counsel, if need be.

Petitioner, as a second alleged ground for equitable tolling, attempts to discredit the Second Circuit's conclusion that "tolling rationale does not apply in the bankruptcy area because plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves [citations omitted]." 7 F.3d at 1074. Petitioner asserts that the Second Circuit was wrong to assume that if he had requested relief from the Stay then that relief would have been granted. (Pet. at 21). That argument ignores the fact that the P.I. Order specifically provided for such relief and that the Trust had asked Petitioner when he would obtain it. (78). Moreover, under Southern District of New York Local Bankruptcy Rule 79, Petitioner could have filed an action in rem against the M/V AMERICAN GEORGIA, on which he served at the time of his alleged injury, at any time irrespective of the Stay and Restraining Order.

Not only are common law principles of equitable tolling not the "applicable nonbankruptcy law" for the "suspension" referred to in § 108(c)(1), but the District Court's factual finding, affirmed by the Second Circuit, that no grounds existed for equitable tolling was correct. Petitioner should, however, be aware that findings of fact do not belong before this Court. United States v. Johnston, 268 U.S. 220, 227 (1925).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEREMY J. O. HARWOOD
Counsel of Record
HEALY & BAILLIE
Attorneys for Respondent
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel:
PHILIP S. LA PENTA
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